A LEGISLATIVE INDICTMENT OF THE COURTS

WE are living in a period of great legislative activity. The amount of statute law upon our shelves is already discouragingly large, but there is no indication of any decrease in the output. It was stated on good authority not long ago that 62,014 statutes were passed by our national and state legislatures during the five years from 1909 to 1913 inclusive, and there has certainly been no diminution in the industry of the lawmakers since that time. If there has been any change it has been in the direction of greater speed. This article, however, is not to be a jeremiad on modern legislation. Unwise and hasty as much of it may be, there can be no doubt that there will have to be much more legislation if we are to have laws which shall fit the conditions which modern industrialism and increasing population are bringing upon us. That the changed conditions will be met and provided for I have little doubt; there will doubtless be much unsatisfactory and experimental legislation enacted during the process, but this does not lead my mind to the conclusion that there is no help in legislation, but rather that we need more scientific legislation, and this means that the educated and thoughtful citizen, and especially the educated lawyer, owes a duty to the state to familiarize himself with the legislation of the day and render any aid that he can in making it more perfect. This, however, is another story. This article is not intended to be hortatory, but suggestive.

There are many things in connection with modern legislation, especially that class of legislation designed to correct real or supposed defects in the existing laws concerning labor and social conditions, which deserve serious thought, and among them there is to my mind nothing more significant than the tendency to take from the courts the duty of settling disputed questions of fact and impose it upon an arbitration committee, or an administrative board or officer with provisions requiring the determination to be made summarily without the aid of a jury and without regard to the strict rules of evidence enforced by the courts.

A striking instance of this tendency is to be found in the so-called Workmen's Compensation Acts which have been placed upon the statute books in a score or more of states during the last few years.

Out of nineteen of these acts passed prior to the year 1914, not one (with the possible exception of the Kansas act) provides for the determination of the facts by the old-fashioned method of a jury trial. The majority of them provide for the trial of disputed facts by an arbitration committee with revision by a commission, or by the commission itself in the first instance, and if there be a judgment entered (which is the case in many of the laws) it is entered as matter of course on the decision of the committee or commission and is not generally subject to review, except a review in the nature of a common law *certiorari* which simply ascertains whether the tribunal has acted within its jurisdiction. Two or three of the laws provide for the trial of the issues by a judge of a court of general jurisdiction, but even in these instances the trial is summary, no jury is called, and every means is taken to free the proceeding from the ordinary rules of procedure and evidence.

The same tendency is to be observed in other modern laws, such, for instance, as the laws regulating public utilities in the various states, in which the frequently recurring controversies of fact between the utility on the one side and the citizen or the public on the other are almost invariably tried and decided by a commission or by some other administrative board or officer subject perhaps to review by the courts by *certiorari* or some like remedy.

This feature of these very important laws is certainly calculated to arrest the serious attention of the lawyer and the judge. If the issues of fact arising under these laws can be more satisfactorily determined by administrative boards than by the courts, why should not the same principle apply to other questions of fact and why should not the courts ultimately retire from business as the triers of such questions and only survive as reviewers of the acts of administrative boards to determine whether or not they have acted within their jurisdiction?

Unquestionably this new policy reverses the precedents of the past. The determination of controversies of fact by courts rather than by executive or administrative officials has long been a marked

feature of our law; indeed this has been one of our boasts. Our constitutions with remarkable unanimity declare that government is divided into three coördinate branches — the executive, the legislative, and the judicial — each supreme in its own sphere and each scrupulously prohibited from encroaching on the exclusive field of activity of either of the others. In addition to this both state and federal constitutions carefully preserve the right of trial by jury as one of the very cornerstones of the temple of liberty; and yet in spite of all this the legislators of these early days of the twentieth century seem to be practically unanimous in the opinion that controversies between employer and employee relating to injuries received in the service should be passed upon by boards of arbitration or administrative commissions or officials rather than by the courts. I am not suggesting that there is any doubt as to the constitutionality of such provisions as these: they have been uniformly and rightly sustained upon the general principle that an administrative governmental agency is frequently required to ascertain and decide disputed questions of fact in order to be able properly to perform its purely administrative duties in the enforcement of a given law, and that in so doing it is not exercising judicial power in the constitutional sense although it acts quasi-judicially.

Nevertheless the judicial branch of the government is created for the express purpose, among others, of determining controversies of fact, and there is nothing in the nature of the controversies in question which substantially differentiates them from others or makes them inappropriate for determination by the courts. Moreover we have no lack of courts. American legislators are in fact surrounded by a multitude of courts. There are courts to the right of them and courts to the left of them; courts of general and courts of limited jurisdiction; courts superior and courts inferior; courts of law and courts of equity; courts municipal and courts rural; courts of first instance and courts of appeal; courts civil and courts criminal; state courts and federal courts — all equipped with judges supposed to be experts in the determination of controversies, all specially commissioned to do just that business, all provided with the necessary machinery to do it, and all paid out of the public treasury. Why should not this expert governmental agency which is already in existence be put into service and its wisdom and experience taken advantage of? Why should new

agencies be created at additional expense to the public when there already exists so complete a system?

This "why" seems to me a very important one, and one which is well worth the study of the lawyer and the publicist. Before attempting a reply to this question let me quote the following words from the address of Elihu Root before the American Bar Association in October, 1914. Among other things Mr. Root said:

"American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men and workmen. The law is made not for lawyers, but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute and go to him and tell their stories and accept his judgment."

I thank Mr. Root for these sentences. In my judgment they contain more wisdom on the subject of legal procedure than has ever been put in the same compass before or since. They express the fundamental principle, or what ought to be the fundamental principle, of procedure with a clearness and simplicity which has not been approached, and they also suggest the answer to the "why."

American legislators of the present day are very largely composed of business men, farmers, and practical laymen of all classes. These practical men made up their minds to remedy in some way the abuses of personal injury litigation between employer and employee, and they took the determination of questions of fact from the courts because they were satisfied that the courts had made a failure of it; in other words, they wanted these questions settled in a practical, expeditious, and businesslike manner and they were quite sure that the courts did not do business in that way.

By their action they have said in effect to the American courts: "You do not do business in a businesslike way, hence we are compelled to create a tribunal that will."

This is a serious indictment. It cannot be ignored, laughed away, or met by mere denials. It must be answered and defended against so far as there may be a defense, and if there be no complete defense there should be no delay or false pride in admitting the fact and making haste to apply the remedy.

I am not disparaging the work of the American courts. Charged

with duties and loaded with responsibilities such as have been imposed upon no other courts, they have, on the whole, acquitted themselves with credit and are entitled to the confidence and respect of every American citizen. This is not saying, however, that their methods are perfect or that there may not be much improvement in procedure.

For myself, I believe there is very substantial basis for the dissatisfaction felt by the practical laymen with the methods used by trial courts generally in the trial of jury cases.

I pass with mere mention the difficulties resulting from extreme niceties of pleading and procedure as well as the unnecessary delays which attend our too numerous appeals from intermediate orders and our frequent new trials. These things have indeed done good service in the great cause of impeding the prompt and businesslike administration of justice, but the matters which I wish now to speak of are matters arising during the conduct of the trial.

There is too much ground for the charge that our jury trials frequently resemble exhibitions of refined legal hermeneutics, or exercises in intellectual gymnastics for the benefit of the lawyers, rather than earnest and practical endeavors to determine a disputed question of fact for the benefit of clients.

Take, for instance, the ancient rule of evidence excluding hearsay testimony. The general principle that hearsay evidence is apt to be unreliable is certainly correct. It may be easily manufactured, it incurs the risk of error resulting from two fallible memories instead of one, and the original teller of the tale is not before the jury nor can he be put under oath. Nevertheless, the enforcement of an inflexible rule that hearsay evidence is never to be received and that if received the judgment must be reversed and the action retried does not strike the practical layman as good common sense, and he has much to justify that conclusion.

Let not the profession be unduly alarmed. I do not advocate the wholesale admission of hearsay evidence, but I do suggest that the ironclad rule of exclusion should be substantially modified. Why not apply something like the same rule which any sensible man applies when he is endeavoring to settle some question of fact upon which his own action depends? He does not lift up his hands in holy horror if a piece of hearsay evidence comes his way, nor does he close his ears to it. If he be fair and honest he remembers

that it is hearsay, he makes allowance for the possible treachery of two memories, he considers the probable truthfulness of the two unsworn witnesses, and he finally rejects it or gives it such weight in the scale as it seems that it ought to have in view of all the circumstances. So if a person in whose truthfulness one has entire confidence relates a statement made by a third person also known to be truthful, his statement will readily be believed even though opposed by the direct testimony of one who claims to have been an eyewitness but who is known to be untruthful. The fact is that we are constantly acting on hearsay evidence in the most important affairs of life. The rigid rule of exclusion originated at a time when jurymen were supposed to be mentally unable to hear a piece of hearsay evidence without giving it the same weight as the direct evidence of a truthful witness, a time when they were treated as children who could not be trusted to act like adult reasonable beings but must be provided with "blinders" to prevent the eyes from wandering outside of a certain very narrow field of vision.

These conditions have changed. Juries selected under modern laws are generally composed of practical, level-headed men of affairs who are entirely capable of making the proper allowance for the inherent weaknesses of hearsay evidence and who want to hear the entire case just as an arbitrator would.

My suggestion is that the rule should be that hearsay evidence is *primâ facie* incompetent but that the trial court in its discretion may admit it when of opinion that it possesses probative value and that such admission is not to be considered as error except in case of an abuse of discretion. Such a change of rule as this would naturally demand (as it seems to me) that the trial judge should have power to caution and advise the jury not only as to the weight of such evidence generally but as to the apparent truthfulness of the witnesses in the instant case and the allowance which in the opinion of the trial judge ought to be made because of the hearsay character of the testimony.

This brings me to the consideration of another feature of our trial procedure which tends to reduce the efficiency of our courts. I refer to the rule, which is almost universal in the state courts, prohibiting the trial judge from expressing an opinion as to the weight of the evidence or the credibility of the witnesses. Instead

of summing up the case and giving the jury something like a luminous review of the evidence with helpful suggestions which his experience and legal training fit him to give, he must confine himself strictly to a colorless statement of legal principles and leave the jury to apply them to the case as best they may.

It is not difficult to see the origin of this rule. The early English colonist had a very clear recollection of the arbitrary and tyrannical methods of the English judges of the seventeenth and eighteenth centuries, the judges who deemed it their duty to carry out the wishes of the king and who hesitated not to browbeat accused persons, force convictions, imprison honest jurymen, and bend the law to accomplish their purpose.

Against such judges the jury was the only defense of the citizen, and the jury must be free and untrammeled. There are no such conditions now. Our judges do not represent the king nor any central administrative power. So far as the state courts are concerned nearly all of the judges are elected by the people and may be retired at the end of their terms by the vote of the people. It is as improbable that such judges should desire to influence the jury for any ulterior purpose as it is lamentable that they are debarred from aiding the jury in a sphere where they are peculiarly fitted to render aid.

It will be said perhaps that it would be unwise to vest such power in the judges on account of the danger that it might be abused by unworthy judges. The same argument exists against the vesting of power in any officer or board. It is possible that it may be abused, but we must vest it somewhere if we are to have government by law; besides, if the power be abused the abuse may always be corrected on appeal. In my judgment efficiency suffers greatly by the rule which prevents the trial judge from assisting the jury by a careful summing up of the case.

Following the same general line of criticism I think it may be said that American trial judges too frequently fail to exercise control over the proceedings in their own courts with that vigor and decision which a judge should exercise. The trial judge should be the master if his court is to produce good results; he must be something more than the moderator of a debating society.

Take, for instance, the examination of jurymen on the *voir dire;* we all know to what lengths it is carried by counsel and how much

valuable time is frequently spent in the examination and reëxamination of prospective jurymen on all sorts of collateral questions which only remotely bear on the question of their competency. Counsel should of course have the right to ascertain whether the proposed juryman is interested or prejudiced, but the trial judge should promptly interfere after this opportunity has been given and it becomes apparent that the privilege is being abused. So also with regard to cross-examination of witnesses the same criticism may often be justly made. It is allowed to go to extreme and absurd lengths; the real issue is obscured by false or collateral issues which are dragged into the case and which court and counsel finally are unable to distinguish from the real issues.

Such examples of failure to control the trial by the judge, to say nothing of such things as the unrebuked browbeating of witnesses, ceaseless trivial objections to evidence, and well-nigh endless discussions of such objections, rightly cause the gorge of the practical layman to rise and move him to denounce courts and lawyers as unpractical and unfitted to deal with business controversies in a day when business is done by telephone and telegraph instead of by the mail-coach.

It is not to be inferred that the courts have been responsible for all the defects and shortcomings in court procedure which are criticised by the practical citizen. The legislative branch is by no means blameless. Take, for instance, the statutory provision which exists in most of the states to the effect that the failure of an accused person to take the witness stand shall not raise any inference of guilt. Such a provision is really an affront to the reason, an attempt to place a sort of padlock on the intellect. The mind is not subject to the mandates of the will, certainly not the legislative will. Nevertheless, the trial courts must give this instruction to the jury when it is requested, or commit reversible error.

Recently a trial judge in one of our western states told me of the following experience with the administration of this statute: In the trial of an important criminal case where the evidence for the state was quite satisfactory, the defendant did not offer himself for a witness, and upon request of the defendant's counsel and in obedience to the statute the judge gave to the jury the caution that they must not base any inference of guilt upon this fact. The jury went out and were gone a long time; they came back for

further instructions and again went out, and finally, much to the judge's relief, brought in a verdict of guilty. A little later the judge met one of the jurymen, a very intelligent business man, and the conversation turned on the case. After some comment on its facts the juryman told the judge that the reason for the difficulty experienced by the jury lay in the charge that no unfavorable inference could be drawn from the failure of the accused to testify in his own behalf, and the juryman said further: "Now, Judge, I have been wondering why you gave the jury that charge." To this the judge replied, "I gave it because I am compelled to do so, — the statute of the state says so." "Well," replied the juror, "that may be the law, but it is not good sense."

The juryman unconsciously formulated the business man's criticism of the methods of the courts. They do not seem to him to be good sense. It certainly is not good sense when a judge tells a jury that he may use the information gained by a view of premises or property to assist him in applying the evidence but cannot use it as evidence; it is not good sense when a judge is obliged to close his eyes to the law of another state because it was not formally introduced in evidence when in fact the book is before him; and it is not good sense when a trial court cannot use standard scientific and technical works in advising both himself and the jury as to a technical question which arises in the case.

The gist of the matter is, as it seems to me, not only that trial judges should more effectively dominate the situation in the trial of cases, but that the courts should possess much more of the freedom of action and flexibility of procedure which is characteristic of the administrative tribunals of which I have spoken. They should be able to use more of the methods used by the ordinary citizen in ascertaining truth. There is, to my mind, no good reason why advances should not be steadily and rapidly made along these lines.

Courts must administer the law in a practical way, as far as possible, "along the lines of laymen's understanding and mental processes" if they are to commend themselves to laymen. They must move forward with the race if they would maintain their commanding position in the administration of governmental affairs.

J. B. Winslow.

SUPREME COURT OF WISCONSIN.